Supreme Court, U.S.
FILED
NOV 12 1992
OFFICE OF THE CLERK

(2)

No. 92-556

In The Supreme Court

OF THE

United States

OCTOBER TERM, 1992

U.A. LOCAL 38 CONVALESCENT TRUST FUND, ESTATE OF JOSEPH P. MAZZOLA and ARISTOCRAT HOTELS, INC.,
Petitioners,

VS.

CAROLE BRADEN, JUANITA RAYMOS, CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SUSAN SHER
514 South School Street
Ukiah, California 95482
(707) 463-1196
Counsel for Respondents

RICHARD M. PEARL
Law Offices of Richard M. Pearl
685 Market Street, Suite 690
San Francisco, California 94105
(415) 243-9912
Counsel of Record for Respondents

INGE DIETRICH
100 Howe Avenue, Suite 185 North
Sacramento, California 95825
(916) 488-9950
Counsel for Respondents

29pp

QUESTIONS PRESENTED

1. Whether the district court correctly retained jurisdiction over the state law claims.

2. Whether the district court correctly awarded summary judgment to the plaintiffs on the issue of retaliation under the California Fair Employment and Housing Act.

3. Whether the district court correctly directed a verdict in favor of the plaintiffs on the issue of discrimination under the California Fair Employment and Housing Act.

4. Whether the jury's verdict was amply supported by trial evidence and the district court was correct to deny a motion for new trial.

5. Whether the district court's refusal to postpone the fee hearing to permit defendants to conduct discovery was well within its discretion.

6. Whether state law, not federal law, provides the standards for determining the amount of attorneys' fee awards under California's Fair Employment and Housing Act, Government Code Section §12965(b).

TABLE OF CONTENTS

Page

Questions Presented 1
Table of Authorities iii
Jurisdiction 1
Statement of the Case 2
Reasons for Denying the Petition 8

1. The District Court Correctly Retained Jurisdiction Over the State Law Claims 9

2. The District Court Correctly Awarded Summary Judgment to the Plaintiffs on the Issue of Retaliation Under the California Fair Employment and Housing Act 10

3. The District Court Correctly Directed A Verdict In Favor of the Plaintiffs on the Issue of Discrimination Under the California Fair Employment and Housing Act 11

4. The Jury's Verdict Was Amply Supported By Trial Evidence and the District Court Was Correct to Deny A Motion For New Trial 12

5. The District Court's Refusal to Postpone the Fee Hearing to Permit Defendants to Conduct Discovery Was Well Within Its Discretion 13

   a. The Plaintiffs' Original Time Records 15

   b. The Precise Terms Of The Contingent Fee Agreement Between Plaintiffs And Their Attorneys 15

6. State Law, Not Federal Law, Provides the Standards For Determining the Amount of Attorneys Fee Awards Under California's Fair Employment and Housing Act, Government Code §12965(b) 17

Conclusion 22

TABLE OF AUTHORITIES

Cases **Page**

Ackerman v. Western Electric Co., Inc.,
643 F.Supp. 836 (N.D. Cal. 1986)
aff'd, 860 F.2d 1514 (9th Cir. 1988) 18

Alyeska Pipeline Co. v. Wilderness Society,
421 U.S. 2140 (1975) 20

Beasley v. Wells Fargo Bank,
235 Cal.App.3d 1407 (1991) 19

Blanchard v. Bergerson,
489 U.S. 87 (1989) 16

Carnegie-Mellon Univ. v. Cohill,
484 U.S. 343 (1988) 10

City of Burlington v. Dague,
505 U.S. ____, 112 S.Ct. 2638 (1992) 17, 20

City of Oakland v. Oakland Raiders,
203 Cal.App.3d 78 (1988) 20, 21

Downey Cares v. Downey Community
Development Comm.,
196 Cal.App.3d 983 (1987) 19, 20

Farley Transp. Co. v. Santa Fe Trail Transp. Co.,
786 F.2d 1342 (9th Cir. 1986) 13

Hamner v. Rios,
769 F.2d 1404 (9th Cir. 1985) 16

Harris v. Duty Free Shoppers, Ltd. Partnership,
940 F.2d 1272 (9th Cir. 1991) 10

TABLE OF AUTHORITIES

Cases **Page**

Hensley v. Eckerhardt,
461 U.S. 424 (1983) 14

Holsey v. Armour Co.,
743 F.2d 199 (4th Cir. 1984)
cert. denied 470 U.S. 1028 (1985) 11

Huddleston v. Dwyer,
322 U.S. 232 (1944) 9

Kabatoff v. Safeco Ins. Co.,
627 F.2d 207 (9th Cir. 1980) 18

Klingebiel v. Lockheed Aircraft Corp.,
494 F.2d 345 (9th Cir. 1974) 21

Lingle v. Norge,
486 U.S. 399 (1988) 9

Malchman v. Davis,
588 F.Supp. 1047 (S.D.N.Y.),
aff'd as modified, 761 F.2d 893 (2nd Cir. 1985),
cert. denied 475 U.S. 1143 (1986) 14

Martinez v. Schock Transfer & Warehouse Co.,
789 F.2d 848 (10th Cir. 1986) 14

Matter of Louis Cairo, No. 84-04,
FEHC Precedential Decisions CEB 3 (1984) 21

National Association of Concerned Veterans v. A Secretary of Defense,
675 F.2d 1319 (D.C. Cir. 1982) 14

Neil v. Biggers,
409 U.S. 188 (1972) 12

TABLE OF AUTHORITIES

Cases	Page
Paramount Pictures Corp. v. Thompson Theatres, Inc., 621 F.2d 1088 (10th Cir. 1980)	11
Serrano v. Priest, 20 Cal.3d 25 (1977)	18
Serrano v. Unruh, 32 Cal.3d 621 (1982)	20
Stewart v. County of Sonoma, 634 F.Supp. 773 (N.D. Cal. 1986)	14
Sullivan v. Crown Paper Board Co., 719 F.2d 667 (3rd Cir. 1983)	17
Swett v. Schenk, 792 F.2d 1447 (9th Cir. 1986)	9
United States v. Johnson, 268 U.S. 220 (1925)	9
United States v. Madrid, 842 F.2d 1090 (9th Cir. 1988), *cert. denied*, 488 U.S. 192 (1988)	13
Venegas v. Mitchell, 495 U.S. 82 (1990)	16
Webb v. Board of Education, 471 U.S. 234 (1985)	14
Woodland Hills Residents Assn., Inc. v. City Council, 23 Cal.3d 917 (1979)	20

TABLE OF AUTHORITIES

Statutes and Rules — **Page**

California Government Code §12940 *et seq.* ..... Passim

California Government Code §12965(b) 7, 17

California Government Code §91003 ..... 19, 20

Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. 185(a)) 3, 9

28 U.S.C. 1254(1) 2

Judicial Improvements Act (28 U.S.C. 1367) 10

Federal Rule of Civil Procedure 50(b) 13

Federal Rule of Civil Procedure 54(b) 11

United States Supreme Court Rule 10.1 8

Miscellaneous

1A Moore's Federal Practice, 3050-3051 18

No. 92-556

In The
Supreme Court of the United States

OCTOBER TERM, 1992

U.A. LOCAL 38 CONVALESCENT TRUST FUND, ESTATE OF JOSEPH P. MAZZOLA and ARISTOCRAT HOTELS, INC.,
Petitioners,

vs.

CAROLE BRADEN, JUANITA RAYMOS, CHRISTINE CHRAPOWICZ and WANDA BROOKS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The above-named respondents respectfully request this Court to deny the petition for writ of certiorari seeking review of the judgment and unpublished opinion of the United States Court of Appeals for the Ninth Circuit in this case entered on June 24, 1992.

JURISDICTION

The disposition of the United States Court of Appeals for the Ninth Circuit was entered on June 24, 1992, affirming in all respects the judgments of the District Court filed August 17, 1990 as well as the fee award for the underlying case filed on January 25, 1991. A petition for rehearing

was denied by a majority of a Court of Appeals panel on August 21, 1992.[1] Petitioners have invoked the jurisdiction of this Court under 28 U.S.C. 1254(1). This case however, contains issues of state law, only which are not appropriate for review by this Court. This Court should therefore decline to exercise its jurisdiction.

STATEMENT OF THE CASE

Respondents are four women who had been employed as waitresses in the dining room of the Konocti Harbor Inn ("KHI") for an average of ten years each. The KHI is a resort complex located in rural Northern California that is owned and operated by petitioner Convalescent Trust Fund ("Trust Fund") of the U.A. Local 38 of the Plumbing and Pipefitting Industry ("Local 38").

Although the job performance of each of the respondents was unquestionably exemplary, each woman was informed by KHI management at the beginning of the 1986 season that due to a new all-male hiring policy in the dining room, the women could either work in the resort's coffee shop or bus tables for the newly hired male waiters. Three of the respondents reluctantly stayed on at KHI and worked in the coffee shop for considerably lower hourly wages and tips. Respondent Braden chose not to accept this substantial demotion and left her employment at the resort. In late 1986, all four women filed complaints alleging sex discrimination with the California Department of Fair Employment and Housing ("DFEH").[2]

---

[1] Petitioners now urge this Court to review almost every issue contained in the decision of the Court of Appeals although in their Petition for Rehearing, they requested reconsideration of the attorneys fee issue only.

[2] Petitioners erroneously state that respondent Braden did not file a complaint with the DFEH in 1986 (Pet. Writ. p. 4). At trial Ms. Braden testified that she did so file but her complaint was misplaced by the agency and a 1987 date was mistakenly affixed to her replacement complaint. The district court judge heard this testimony and judged it as credible. At any rate, the agency issued Ms. Braden a right to sue letter which indicated that she had filed in a timely manner.

In March 1987, the Trust Fund and Aristocrat Hotels, Inc. ("Aristocrat") entered into a written contract for Aristocrat to manage and operate KHI through 1988. In early 1987 after the filing of their DFEH complaints, respondents Raymos, Brooks and Chrapowicz attempted to re-apply and return for work as they had done for the last several years. Although they each submitted applications on three separate occasions, they were told by Aristocrat staff that these applications were lost and then later rejected. Realizing the futility of re-applying for work at KHI, respondent Braden did not bother to do so.

As a result of negotiations with respondents' counsel in late 1988, Aristocrat offered to allow the women to return to their former jobs. Respondents Raymos and Chrapowicz, mistrusting of the offer, chose not to return. Respondents Brooks and Braden quit other work and did go back to work at KHI but found that they were given reduced table assignments and working hours. They were also, as were Raymos and Chrapowicz in 1987, generally treated in a hostile manner by management. Braden and Brooks worked until the beginning of the 1989 season when they were effectively forced out of their jobs by receiving so few and such undesirable table assignments.

After the DFEH proceedings failed to result in a settlement, respondents in November 1987 filed their complaint in California Superior Court for the County of Lake. Alleging the existence of federal jurisdiction based upon the Labor Management Relations Act (29 U.S.C. 185 (a)) because the respondents were members of a union which had negotiated a collective bargaining agreement with the employer, petitioners removed the case to United States District Court for the Northern District of California. Arguing for remand, respondents pointed out that their action was based primarily on state anti-discrimination law and interpretation of the collective bargaining agreement was not relevant to these proceedings. Petitioners opposed this remand motion which was denied by the district court.

Throughout the first year of litigation, respondents pared down their complaint until only causes of action for sex and age discrimination under the California Fair Employment and Housing Act (California Government Code §12940 *et seq.*) remained. During that first year, however, the district court heard and decided two of petitioners' motions to dismiss, respondents' motion to compel discovery and respondents' request for preliminary injunction, and it ordered two settlement conferences be held before U.S. Magistrates.

The district court litigation, which was vigorously and bitterly contested by petitioners, continued for another twenty months until trial. During that time, the involvement of the district court became even more extensive: it granted five further motions of respondents to compel discovery and awarded sanctions against petitioners' counsel on two occasions; it decided several issues related to establishment of a class which respondents proposed; it decided several summary judgment motions brought by all parties; it granted respondents permission to substitute the estate of Joseph P. Mazzola after that defendant died. It was not until the eve of trial at a pretrial conference that petitioners for the first time alleged that the district court did not properly have jurisdiction over this case.

In November 1989, the district court heard respondents' motion for partial summary judgment. As petitioners have stated to this Court, no opposition was filed and the motion was granted as to respondents' retaliation claim. The district court denied the motion, however as it pertained to respondents' sex discrimination claims, finding that disputed issues of fact still existed. Following the district court's decision on the summary judgment motions, petitioners submitted a proposed order which contained several pages of argument in support of a position that Aristocrat would not be liable for retaliation and that Carole Braden was not entitled to summary judgment for 1987, arguments which

had not been offered prior to the court's decision. Just before trial, petitioners attempted to re-litigate the entitlement of respondents to summary judgment for retaliatory non-hirings by filing three separate *in limine* motions. The district court denied all of those motions.

Trial began on June 6, 1990 and took sixteen whole or partial court days. All four of the respondents testified as to their extensive experience in tableside food preparation gained at premium restaurants where they had previously worked. They also testified that they were not asked about this experience by KHI management prior to being ousted from the dining room. Additionally, they testified to the fact that they were told by various KHI management personnel that Joseph P. Mazzola wanted to remove them from the dining room and replace them with male waiters. A former management employee also testified regarding Mazzola's instructions to replace the women.[3]

Two young men who were hired as waiters in the KHI dining room in 1986 and 1987 testified that they had very little experience waiting tables prior to that time and that the work that they performed in the dining room during those years required only minimal training. One of these men also testified that he had bussed tables for the respondents in prior years. Based upon all of this uncontested evidence, the district court directed a verdict in favor of respondents on the issue of sex discrimination.

Both in their brief before the Court of Appeals and in their petition before this Court, petitioners rely heavily upon their written response to the DFEH which "set forth the reasons why in management's opinion the 1986 dining room

---

[3] Nothing in the record supports petitioners' contention that KHI management told the four women that "there was not enough time to train them in the new menu . . ." (Pet. Writ, p. 4).

waiters were better qualified than each of the plaintiffs to serve the 1986 menu." (Pet. Writ, p. 6). This trial exhibit which contained a glorified description of the 1986 KHI Italian dining room menu and service style and which claimed strict job requirements for the KHI dining room waitstaff, however, was only a self-serving explanation for the discriminatory policies which were instituted. No testimony was heard at trial which supported the assertions contained in the document; neither the unidentified author of the response nor the chefs or maitre d' appeared to testify. In support of their position that the plaintiffs were not qualified to work in the dining room in 1986, petitioners continue to rely on testimony which was never offered.

The jury awarded damages based upon the evidence which it heard at trial and the exhibits which it had on hand during its deliberations. Among those exhibits were documents known as payroll earnings registers which contained records of hours worked and tips reported by table waitpersons. The jury had heard evidence that in the restaurant industry waitpersons frequently underreport the total amount of tips earned. Indeed, the payroll earnings registers showed that several KHI waiters reported no tips for two week periods while they were fully employed. Additionally, Frank Sullivan, Trust Fund administrator testifying for petitioners explained that IRS allocated tip regulations require employers to record a minimum amount of tips earned; often these ascribed amounts are way below what employees really earn as tips. For those reasons, the jury calculated the lost wage damages which it reasonably thought the respondents were entitled. The jury also awarded damages for emotional distress and punitive damages against the Trust Fund.[4]

[4] The petitioners filed separate motions for new trial and motions for judgment notwithstanding the verdict arguing that the jury improperly enhanced the damage awards. Petitioners further argued before the Court of Appeals that the jury was guilty of misconduct in this regard. Those arguments were all rejected.

Following the judgment for plaintiffs on the merits, plaintiffs then moved for an award of reasonable attorneys' fees under the attorneys' fee provision in California's Fair Employment & Housing Act, California Government Code §12965(b). Their motion was supported by the detailed declarations of each of plaintiffs' two principal counsel, including sixty-nine (69) pages of detailed time summaries explaining every task for which compensation was being claimed. Defendants then filed their opposition to plaintiffs' motion, arguing, *inter alia,* that plaintiffs were not the prevailing parties, that they (defendants) were entitled to an offset for their attorneys' fees, that plaintiffs' hours and rates were too high, that plaintiffs' fee should be reduced by whatever contingent fee the plaintiffs had agreed to pay their attorneys, and that an enhancement was not appropriate. Then, a week after their opposition was filed and eight (8) days before the hearing, defendants served plaintiffs with deposition notices seeking to depose plaintiffs' attorneys and requesting the production of virtually every document in plaintiffs' attorneys' files. Plaintiffs then filed their reply.

The District Court heard extended argument on plaintiffs' fee motion. Following argument it ruled that plaintiffs were the prevailing parties. The court denied defendants' request to postpone the hearing and permit them to take discovery, finding that the case had been too prolonged and expensive already, that defendants would not be permitted to turn the fee proceedings into a "mini trial," and that the record before it was adequate to make the determinations required under the applicable standards, particularly because the trial court judge had observed the entire proceedings from start to finish. ER at 214.

The court also ruled that the specific terms of the contingency agreement between plaintiffs and their attorneys was irrelevant to its determination because those terms concerned the division of fees between plaintiffs and their

attorneys, while the court was concerned with an award from the defendants to plaintiffs. *Id.* at 214-215. The court also observed there had been "a lot of unnecessary stonewalling and hardball being played by the defense," and that the records presented by plaintiffs were adequate to establish the number of hours reasonably spent. The court awarded the plaintiffs a total of 2,000 hours for their work on the merits, constituting a reduction of twelve percent (12%) from the total hours claimed.

With respect to the enhancement, the court took into consideration a number of factors, including the contingent nature of plaintiffs' attorneys' fees, the nature of the case, the interests involved and the community interests to be served, as well as other factors mentioned by the defendants. It found, however, that the 2.0 enhancement requested by plaintiffs was too high for this case. Based on those factors, it reduced the enhancement to 1.75.

Following the court's decision and entry of a judgment reflecting its terms, the defendants moved jointly to alter or amend the judgment for attorneys' fees. That matter was heard on March 1, 1991 and was denied.

REASONS FOR DENYING THE PETITION

Petitioners have not raised any issues which justify review by this Court. Not one ground calls for the exercise of judicial discretion as envisioned by United States Supreme Court Rule 10.1. No conflict among the circuits nor any important federal questions are even remotely suggested. Rather, every aspect of this writ involves interpretation of California state law or a re-hashing of factual arguments that were rejected by the district court, jury and Court of Appeals.

Many years ago this Court succinctly stated, "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson*, 268 U.S. 220, 227 (1925). This Court has also expressed its reluctance to review cases which turn solely on state statutes. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). On both grounds, the instant petition should be denied.

1. The District Court Correctly Retained Pendent Jurisdiction Over the State Law Claims

Petitioners argue that the district court abused its discretion by retaining jurisdiction of respondents' state law claims after the last federal cause of action disappeared. As mentioned, petitioners who had removed the case originally did not raise the issue of possible improper jurisdiction until the eve of trial, after over two and a half years of active involvement of the district court. They now propose that some or all of this proceeding be re-heard by a state court despite conduct of a full jury trial in federal court.

Petitioners' reliance on *Lingle v. Norge*, 486 U.S. 399 (1988) is misplaced. (Pet. Writ, p. 6). For *Lingle* to apply, petitioners must assert that their own original removal of this case from state court based on Section 301 of the Labor Management Relations Act was improper. On the contrary, they insist on the propriety of the removal. Following this logic, the district court thus correctly acquired pendent jurisdiction over the state claims, and with it the discretion to remand or retain the case. *See Swett v. Schenk*, 792 F.2d 1447 (9th Cir. 1986). Since the district court did in fact dispose of several motions and discovery disputes prior to the elimination of the federal claims and gained considerable familiarity with the case, there can be no abuse

of discretion on the part of the district court in having retained those claims.[5]

The propriety of the district court's retention of jurisdiction is further supported by the recently enacted Judicial Improvements Act of 1990 (28 USC 1367). This statute which codified pre-existing case law concerning theories of pendent jurisdiction adopted standards which limit the broad discretion of federal district courts to decline to exercise jurisdiction over pendent state law claims.

2. The District Court Correctly Awarded Summary Judgment to the Plaintiffs On the Issue of Retaliation Under the California Fair Employment and Housing Act

As stated, the trial judge granted partial summary judgment to respondents on the issue of retaliation because petitioners utterly failed to demonstrate the existence of any triable fact. As the Court of Appeals pointed out, nor did petitioners even attempt to argue that relevant facts remained to be discovered which might have changed the outcome of this motion. *See Harris v. Duty Free Shoppers, Ltd., Partnership,* 940 F.2d 1272, 1276 (9th Cir. 1991). (Pet. Writ., p. 5a).[6]

Despite the absence in the record of any trial evidence which may have defeated summary judgment if offered at

---

[5] Petitioners argue that this Court's opinion in *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. 343 (1988) should "open the door to remandment." That case however, stands for the opposite principle that the district court has the discretion "to deal with cases involving pendent claims in the manner that best serves the principles of economy, convenience, fairness and comity which underlie the pendent jurisdiction doctrine." *Carnegie-Mellon Univ. v. Cohill,* 484 U.S. at 357.

[6] Petitioners have conceded that they failed to properly oppose respondents' motion for partial summary judgment when it was brought in the district court in November 1989. They also concede that they retaliated against Ms. Raymos, Ms. Chrapowicz and Ms. Brooks. (Pet. Writ, p. 6)

the time the motion was brought, petitioners now argue that pursuant to Federal Rule of Civil Procedure 54(b), the district court judge was obligated to revise this summary judgment order. (Pet. Writ, p. 12). This argument based on Fed.R.Civ.P. 54(b) was not raised by petitioners in either the district court or in the Court of Appeals. It is raised here for the first time and therefore should not be considered. Nevertheless, a trial court's decision to alter a non-dispositive ruling prior to the entry of a final judgment is, however, left to the discretion of the trial judge; nothing in this rule dictates that he or she must do so. *See, e.g., Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980).

In support of their contention that the grant of summary judgment was improper, petitioners have repeated their argument that respondent Carole Braden should not have been entitled to summary judgment on retaliation because she did not apply for work at KHI in 1987. At no stage of these proceedings have petitioners raised any evidence to show that Ms. Braden would have been treated any differently than the other three respondents who were refused work at KHI in 1987 had she re-applied during that year. Courts have consistently held that where it would be futile or where the employer had discouraged protected group members' applications, no application need be made. *See, e.g., Holsey v. Armour Co.*, 743 F.2d 199 (4th Cir. 1984) *cert. denied* 470 U.S. 1028 (1985).

3. The District Court Correctly Directed A Verdict In Favor of the Plaintiffs On the Issue of Discrimination Under the California Fair Employment and Housing Act

Petitioners request this Court to consider overturning the findings of fact of the district court and the Court of Appeals which resulted in an award of directed verdict on the issue of sex discrimination. In doing so, petitioners appear

to ignore the honored tradition of this Court to refrain from overturning the concurrent findings of fact of two lower federal courts unless such findings are shown to be clearly erroneous. *Neil v. Biggers*, 409 U.S. 188, 193 (1972).

At trial, respondents presented undisputed evidence of petitioners' 1986 adoption of a males-only hiring policy and of the minimal table service experience of two of the males hired to replace the women. All of the respondents testified as to their extensive restaurant experience which included tableside service. Moreover, it was undisputed that petitioners never even inquired if respondents had the requisite qualifications -- they simply demoted them because they were female. Petitioners presented no evidence which rebutted those qualifications or proved that the women were demoted for other than discriminatory reasons. Indeed, the jury found against the remaining defendant, Joseph P. Mazzola on the same issues -- retaliation and discrimination. As the Court of Appeals stated, directed verdict on this issue was granted because plaintiffs had established a prima facie case which the defendants did not adequately answer or rebut. (Pet. Writ, p. 6a).[7] There is no reason for this Court to review that factual determination.

4. The Jury's Verdict Was Amply Supported By Trial Evidence and the District Court Was Correct to Deny A Motion For New Trial

Petitioners next argue that evidence offered at trial was not sufficient to support the jury verdict for the plaintiffs and the district court should therefore have reduced the verdict or granted a new trial on damages. Petitioners

---

[7] The jury awarded damages based on the trial court's summary judgment on retaliation and directed verdict on sex discrimination under California Government Code Sections §12940(a) and (f), respectively. The jury did not however, award double damages based on both theories of liability. The damages were therefore sustainable under either theory of liability.

baselessly maintain that "the jury was outside the evidence" when it calculated the plaintiffs' lost wage damages. (Pet. Writ, p.13). As set forth in the Statement of the Case herein however, the jury had before it the payroll earnings registers which enabled it to calculate the plaintiffs' lost wages based upon the reported and often underreported hours and tips of other KHI employees.[8]

The trial judge had ample opportunity to assess the rationality of the jury's damage awards. Since the trial judge is in the best position to evaluate the correctness of the jury's decision, this Court has traditionally given considerable deference to the conclusions of the trial judge in this regard. *See, e.g., United States v. Madrid,* 842 F.2d 1090, 1092 (9th Cir. 1988), *cert. denied,* 488 U.S. 912 (1988). Petitioners' argument that the district court committed reversible error in upholding the damage is therefore without merit.[9]

5. The District Court's Refusal To Postpone the Fee Hearing To Permit Defendants to Conduct Discovery Was Well Within Its Discretion

The question of whether and to what extent to permit discovery in attorneys' fee cases is a matter wisely left to

---

[8] Petitioners' argument regarding the insufficiency of evidence to support the jury's verdict is further weakened by their failure to move for directed verdict on that issue at the close of all of the evidence. Under Fed.R.Civ.P. 50(b), such motion must be made in order to preserve the right to move for judgment notwithstanding the verdict and to preserve any appeal based on alleged insufficiency of the evidence. *Farley Transp. Co. v. Santa Fe Trail Transp. Co.,* 786 F.2d 1342, 1345-47 (9th Cir. 1986). Though petitioners made various motions for directed verdict, none of these motions specifically alleged insufficiency of evidence.

[9] The district court explained its reasoning for denying defendants' new trial motions: "With respect to the damages I think the jury's damages awards were rational. We can always go back and reprogram the numbers and figure out how it might have been done differently... But I don't believe it's the plaintiffs' burden or the jury's burden or my burden to set forth the precise methodology that the jury used and to inspect that and determine whether their mathematics... were correct." E.R. at 173.

the sound discretion of the district court. *See, e.g., Malchman v. Davis*, 588 F.Supp. 1047 (S.D.N.Y. 1984), *aff'd as modified*, 761 F.2d 893 (2nd Cir. 1985), *cert. denied* 475 U.S. 1143 (1986). Such a rule is entirely consistent with this Court's admonition that attorneys' fee proceedings "should not result in a second major litigation." *Hensley v. Eckerhardt*, 461 U.S. 424, 437 (1983), *Webb v. Board of Education*, 471 U.S. 234, 244 n. 20 (1985).

Numerous courts have recognized that there is no right to discovery in attorneys' fee matters. *See, e.g., Malchman v. Davis, supra* (party opposing fee "failed to make cogent factual objections which indicate the need for discovery" and a "large record exists which is ample to permit decision on the relevant issues"); *Martinez v. Schock Transfer & Warehouse Co.*, 789 F.2d 848, 849-50 (10th Cir. 1986) (District Court did not abuse discretion in denying all discovery of fee issue where District Court found that "further discovery would not be of any substantial assistance in resolving this issue"); *Stewart v. County of Sonoma*, 634 F.Supp. 773, 776 (N.D. Cal. 1986) (defendant's request for further discovery denied because parties "have amassed an abundant record on this application" and court was thoroughly familiar with case). In *National Association of Concerned Veterans v. A Secretary of Defense*, 675 F.2d 1319, 1329 (D.C. Cir. 1982), the Court of Appeals emphasized that District Courts should have considerable control over discovery in attorneys' fee matters:

> "[I]t is not expected that fee contests should be resolved only after the type of searching discovery that is typical where issues on the merits are presented. The trial court retains substantial discretion based on its view of the submissions as a whole to guide any further inquiry . . . The sound administration of justice requires a balanced, informed approach to fee awards accomplished in reasonable time without turning such matters into a full trial."

a. The Plaintiffs' Original Time Records

In the instant case, the District Court refused to postpone its determination of plaintiffs' entitlement to fees on the basis of the defendants' belated -- it was filed six (6) days after their opposition was filed and only eight (8) days before the hearing on plaintiffs' fee motion -- requests for discovery. That request included the deposition of plaintiffs' two principal attorneys, which defendants estimated at two to three days each, and a broadly worded document request.

The ostensible purpose of this discovery was to examine the underlying documents on which plaintiffs' time records were based, for the main purpose of "checking their mathematical accuracy." The District Court, heeding this Court's admonition not to turn attorneys' fee litigation into "mini-trials," refused to postpone the hearing. It recognized that it had a full and complete record before it, that defendants had every opportunity to challenge any specific time entry claimed by plaintiffs' attorneys but had failed to do so,[10] and had every opportunity to present evidence as to the appropriate enhancement, but had failed to do so. Its decision was eminently correct.

b. The Precise Terms Of The Contingent Fee Agreement Between Plaintiffs And Their Attorneys

Petitioners also contend that the District Court should not have determined plaintiffs' fee without consideration of the specific terms of the particular

---

[10] Plaintiffs' time records were detailed by date, task, and number of hours spent per task. If defendants had reason to doubt any particular time entry, they surely could have raised it in their Opposition. Yet, no such questions were raised.

Likewise, if what defendants mainly wanted was to check plaintiffs' "mathematical accuracy", that surely could be done from plaintiffs' time computations.

contingent fee agreement between the plaintiffs and their attorneys.

Petitioners' position is unsupportable. In *Blanchard v. Bergeron*, 489 U.S. 87 (1989), this Court did not hold, as Petitioners argued below, that a District Court "must" consider the terms of a contingent fee agreement in determining a reasonable fee. Rather, *Blanchard v. Bergeron* simply holds that "the presence of a pre-existing fee agreement may aid in determining reasonableness." 489 U.S. at 93 (emphasis added).

In *Venegas v. Mitchell*, 495 U.S. 82 (1990), however, this Court upheld an attorney's right to enforce a contingent fee agreement with his client that called for a fee larger than the statutory fee awarded by the court, concluding that "Section 1988 controls what the losing defendant must pay, not what the prevailing plaintiff must pay his lawyer, . . ." 495 U.S. at 90. This is precisely the reasoning utilized by the District Court below when it rejected defendants' argument that a fee determination could not be made without requiring the production of the plaintiffs' contingent fee agreement with their attorneys.[11]

In their heading, but not in their argument, petitioners claim that there is a split in the Circuits on this issue, citing *Hamner v. Rios*, 769 F.2d 1404 (9th Cir. 1985). However, whatever split there might once have been has been resolved by this Court's more recent decisions in *Blanchard v. Bergeron*, and *Venegas v. Mitchell, supra*.

---

[11] As the district court stated: "What we are concerned with here is an adequate award of attorneys' fees to the plaintiffs from the defendants, not a question of how the money might be shared between the plaintiffs and their counsel." E.R. at 214: 22-25.

Finally, petitioners conclusively assert that any fee due to plaintiffs' attorneys under their contingent fee agreement with their clients should be deducted from the amount due from defendants. (Pet. Writ, p. 15.) However, even the one case petitioners cite in this section of their Petition, *Sullivan v. Crown Paper Board Co.*, 719 F.2d 667, 668-669 (3rd Cir. 1983), unequivocally rejects that argument. Speaking of the possible effects that plaintiffs' contingent fee agreement might have on the fee award, the court held that one thing it should not do is reduce the defendants' obligation to pay a reasonable fee award:

> "[Ordering the defendant to pay only the difference between the statutory award and the contingent fee] is an inequitable solution that would give a windfall to the defendant despite the finding of liability. Such a result would also frustrate the legislative policy objective that the fee itself serve as a disincentive to future discriminatory conduct." 719 F.2d at 669.

6. State Law, Not Federal Law, Provides The Standards For Determining The Amount of Attorneys' Fee Awards Under California's Fair Employment and Housing Act, Government Code §12965(b).

Respondents' attorneys' fees here were awarded under state law (pursuant to the California Fair Employment and Housing Act (FEHA), California Gov't Code §12965(b)), because on the merits, plaintiffs had prevailed on their pendent FEHA claim for relief. Petitioners argue, however, that the award of fees under state law must be reversed because of this Court's recent decision affecting federal attorneys' fee awards, *City of Burlington v. Dague*, 505 U.S. ___, 112 S.Ct. 2638 (1992).

Petitioners' argument defies both caselaw and logic. State law, not federal law, determines the amount of attorneys' fees awardable under state fee statutes in federal courts. As petitioners concede, determination of which law applies in pendent jurisdiction cases is the same as the determination of which law applies in diversity cases. *See* Pet. Rhg. at 5:17-20, citing 1A Moore's *Federal Practice*, pp. 3050-3051, 3419. *See, e.g., Kabatoff v. Safeco Ins. Co.*, 627 F.2d 207, 210 (9th Cir. 1980) (reviewing fee award premised on Oregon law on the basis of the factors that determine a reasonable attorneys' fee under Oregon law).[12]

The use of state law to determine the amount of attorneys' fees in pendent jurisdiction cases also makes perfect sense. This case was in federal court only because defendants removed it from state court, claiming that plaintiffs had inartfully pleaded a federal cause of action. Plaintiffs should have no lesser rights or remedies under FEHA than they would have had if defendants had not removed the case initially.

In the instant case, the district court's calculation of a reasonable attorneys' fee is perfectly consistent with California law. The California Supreme Court has expressly held that under state fee statutes, courts may augment or diminish the lodestar fee based on a number of different factors, including the contingent risk of not prevailing. In *Serrano v. Priest*, 20 Cal.3d 25, 49 (1977), the California

[12] While petitioners allege that there is a split of authority in the Circuits on this issue, in fact no such split exists. The split referred to in *Ackerman v. Western Elec. Co. Inc.*, 643 F.Supp. 836, 857 (N.D. Cal. 1986), *aff'd*, 860 F.2d 1514 (9th Cir. 1988) is easily explained by distinguishing purely procedural issues (like timing of the motion, scope of discovery, need for a hearing, etc.), which are governed by federal law, from the substantive issues of entitlement to fees and the amount thereof, which are governed by state law because they are an integral part of the remedy provided by state law.

Moreover, because the Court of Appeals' decision here is an unpublished Memorandum, no conflict is created.

Supreme Court listed six non-exclusive factors that a court may consider in deciding whether to increase or decrease the lodestar figure. Those factors are:

> "(1) the novelty and difficulty of the questions involved, and the skill displayed in presenting them; (2) the extent to which the nature of the litigation precluded other employment by the attorneys; (3) the contingent nature of the fee award; (4) whether the award would ultimately fall upon the taxpayers or would be borne by private individuals and enterprises; (5) whether the attorneys involved receive public and charitable funding for the purpose of bringing this kind of lawsuit and (6) whether the money awarded would inure to the benefit of a public interest organization, rather than the individual attorneys."

Subsequently, the state courts have applied this same rule in a variety of contexts. For example, in *Downey Cares v. Downey Community Development Comm.*, 196 Cal.App.3d 983, 995 (1987), the Court of Appeal cited to the Serrano factors in upholding a 1.5 multiplier under California Gov't Code §91003.

Most recently, in *Beasley v. Wells Fargo Bank*, 235 Cal.App.3d 1407 (1991), the Court of Appeal upheld a 1.5 multiplier awarded to plaintiffs' attorneys under a state fee statute, based on the need to attract competent counsel to take such cases on a contingent basis. 235 Cal.App.3d at 1418-19. On March 12 of this year, the California Supreme Court denied the bank's Petition for Review.

Here, the district court expressly considered several factors in determining the multiplier -- "the nature of the case and the interest involved and the community interest to be served, as well as certain of the other factors mentioned

by the defendants" (ER 218:1-6) -- which, at the time the award was made, were not permissible factors to use in determining a multiplier under federal law but were permissible factors under California law. *See City of Oakland v. Oakland Raiders*, 203 Cal.App.3d 78, 83 (1988).

This body of law is based on California legislation and policy, not the federal fee statues interpreted in *City of Burlington v. Dague*. In *Serrano v. Unruh*, 32 Cal.3d 621 (1982), the California Supreme Court expressly held that while federal private attorney general fee statutes have some precedential value, "[f]ederal decisions rest in part on evidence of congressional intent (citation) for which there is no California parallel. We envision an independent state rule." 32 Cal.3d at 639, n. 29. (Emphasis added.)[13]

In fact, the very argument petitioners raise here -- that "multipliers" under California law should be restricted in the same manner that they are restricted under federal law -- has been rejected on several occasions by California authorities. In *Downey Cares v. Downey Community Dev. Com'n, supra*, the appellant suggested that, in determining a reasonable fee under California Gov't Code §91003, the court should follow federal Supreme Court decisions were based on federal statutes and legislative history "for which there is no California parallel." 196 Cal.App.3d at 995. Instead, the court relied upon the "already well established" body of California law under §1021.5 and affirmed a 1.5 multiplier. *Ibid.*

[13] California law is based, at least in part, on federal decisional law that predates the United States Supreme Court's decision in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975). In *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal.3d 917, 934, (1979), the California Supreme Court held that "the legislature drew heavily upon the pre-*Alyeska* federal decisions, we believe that such authorities -- while no longer viable in the federal realm -- will often be helpful and reliable guides in interpreting the various provisions of the California statutes." *See also Serrano v. Unruh, supra*, 32 Cal.3d at 632 n. 14.

In *City of Oakland v. Oakland Raiders*, *supra*, the Court of Appeal upheld a 2.5 multiplier to the Alioto firm, petitioners' counsel here, despite the City's argument that under federal Supreme Court cases, most of the factors on which the multiplier was based were already included in the lodestar. The Court of Appeal noted that California's independent body of attorneys' fee law "mandated" the consideration of such factors over and above the lodestar figures. 203 Cal.App.3d at 84 n.5.[14]

The California caselaw is clear. Petitioners seek redress in the wrong forum:

> "[T]he duty of the federal court is to ascertain and apply the existing California law, not to predict that California may change its law and then to apply the federal court's notion of what that change might or ought to be. The proper fora in which to seek to change California law are the California legislature and the California courts, not the federal courts." (Footnotes omitted.)

Klingebiel v. Lockheed Aircraft Corp., 494 F.2d 345, 346 (9th Cir. 1974).

---

[14] The California Fair Employment and Housing Commission (FEHC), the state agency charged with enforcing and interpreting the Fair Employment and Housing Act, has expressly held that state law, not federal law, governs fee awards under #12965(b). *Matter of Louis Cairo*, No. 84-04, FEHC Precedential Decisions CEB 3 (1984).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

SUSAN SHER
514 South School Street
Ukiah, California 95482
(707) 463-1196
Counsel for Respondents

RICHARD M. PEARL
Law Offices of Richard M. Pearl
685 Market Street, Suite 690
San Francisco, California 94105
(415) 243-9912
Counsel of Record for Respondents

INGE DIETRICH
100 Howe Avenue, Suite 185 North
Sacramento, California 95825
(916) 488-9950
Counsel for Respondents

November 1992